No. 79-586

DEC 10 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM R. KRAYNAK, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-15) is reported at 604 F. 2d 231. The opinion of the district court (Pet. App. 17-23) is reported at 457 F. Supp. 907.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16) was entered on August 22, 1979. The petition for a writ of certiorari was filed on October 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that the provisions of the Federal Coal Mine Health and

Safety Act of 1969, 30 U.S.C. 801 *et seq.* (Coal Act)[1] apply where the only persons working in a mine are four brothers who own and operate it.

2. Whether the court of appeals properly concluded that, by selling more than 10,000 tons of coal annually to a paper producer whose products are nationally distributed, petitioners' operations affect interstate commerce within the meaning of the Coal Act.

STATEMENT

On April 27, 1977, authorized representatives of the Secretary of the Interior went to Kraynak Coal Company's No. 3 Mine in Indiana County, Pennsylvania, to conduct an inspection pursuant to 30 U.S.C. 813(a).[2] The inspectors were twice refused admittance

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[1]Effective March 9, 1978, the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. (Supp. I) 801 *et seq.*, extensively amended the Coal Act, renamed it the Federal Mine Safety and Health Act of 1977, and transferred administrative responsibility from the Department of the Interior to the Department of Labor. The provisions of the Coal Act germane to this case, however, were not significantly changed.

[2]30 U.S.C. 813(a) reads as follows:

> Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

(Pet. App. 18-19). The Secretary thereupon brought an action in the United States District Court for the Western District of Pennsylvania to enjoin petitioners from refusing to allow federal inspectors into the mine. The district court entered summary judgment in the Secretary's favor (Pet. App. 17-23) and the court of appeals affirmed (*id.* at 13-15).

The mine involved here is owned and operated by petitioners, who are four brothers. No other persons have worked for Kraynak Coal for at least seven years, and none is expected to do so in the future (Pet. App. 18). In 1977, Kraynak Coal produced 12,524 tons of coal, 9,000 tons of which came from Mine No. 3. More than 80% of Kraynak Coal's production that year, 10,268 tons, was delivered to Penntech Papers, Inc., a company based in Pennsylvania (*id.* at 19). Although the price Penntech paid varied, it was never less than $25 per ton (A. 52a-53a).[3] Thus, Penntech paid Kraynak Coal at least $256,700 for coal in 1977. Penntech is a paper processing corporation that depends upon out-of-state enterprises for supplies and raw materials. After manufacturing the paper, Penntech sells 95% of its products in states other than Pennsylvania (Pet. App. 19).

The district court held that the Coal Act covers mines in which the owners are the only miners. "The intent of Congress is unambiguous," said the court, "that operators working as miners are included in the Act" (Pet. App. 20). The court also held that by selling more than 10,000 tons of coal annually to Penntech, Kraynak Coal entered and affected interstate commerce within the meaning of the Act (*id.* at 23).

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[3]"A." refers to the appendix in the court of appeals.

The court of appeals affirmed per curiam. It agreed with the district court that the "statutory language is free from ambiguity" and covers mines worked solely by owners (Pet. App. 14) and that Kraynak Coal's products and operations entered and affected interstate commerce. "In enacting the statute," the court observed, "Congress intended to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation' " (*id.* at 14-15).

ARGUMENT

1. Petitioners maintain (Pet. 4-6) that Congress did not intend the Coal Act to cover mines in which only the owners mine coal and which, therefore, have no "employees" as such. This claim is insubstantial. The Coal Act, in unequivocal language, covers all mines (including ones that are owner-operated) and all miners (without regard to whether they are employees). The Act states that "[*e*]*ach coal mine*, the products of which enter commerce, or the operations or products of which affect commerce, *and each operator* of such mine, *and every miner* in such mine shall be subject to the provisions of this [Act]." 30 U.S.C. 803 (emphasis added). "[M]iner," in turn, is defined as "*any* individual working in a coal mine." 30 U.S.C. 802(g) (emphasis added).[4]

[4]This definition contrasts with the definition of "miner" in separte provisions of the Coal Act affecting black lung benefits. "[M]iner" was defined as "any individual who is or was *employed* in an underground coal mine." 30 U.S.C. (1970 ed.) 902(d) (emphasis added). Clearly, Congress knew how to limit coverage of a statute to employees when that was its intent.

The definition of "miner" for purposes of black lung benefits was changed by Section 2(b) of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, to include "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." Thus, owners who work in coal mines may now be eligible for black lung benefits.

The legislative history of the Coal Act is consistent with the Act's literal terms. As noted in *Marshall* v. *Donofrio*, 465 F. Supp. 838, 840 (E.D. Pa. 1978) (footnote omitted), aff'd, 605 F. 2d 1196 (3d Cir. 1979) (table), petition for cert. pending, No. 79-848:

> [T]here is evidence that Congress was expressly made aware of the possibility that owner-operated mines would be included within the Coal Mine Act's coverage at the time the Act was amended in 1966 to extend coverage to mines employing less than 15 men underground. *See* S. Rep. No. 1055, *reprinted* at 1966 U.S. Code Cong. & Admin. News, pp. 2072, 2087 (Statement of Senator Cooper). Although Congress was aware of the problem, it chose not to exempt such mines at that time or at any time subsequent.

It is therefore apparent that, as the court of appeals stated, the "statutory language is free from ambiguity and comports with the legislative purpose 'to require that * * * every miner in such mine comply with [the Act's] standards' " (Pet. App. 14). Hence, the court below correctly concluded that Kraynak Coal's operations are subject to the Coal Act, and further review is unwarranted.[5]

[5]There is no conflict among the circuits on this issue. Three times in recent months the Third Circuit has considered whether the Coal Act covers mines in which only the owners mine coal, and each time the court has concluded that it does. *Kleppe* v. *Shingara*, No. 76-2416 (Feb. 26, 1979); *Marshall* v. *Bosack*, No. 78-1803 (Jan. 15, 1979); *Marshall* v. *Donofrio*, *supra* (construing virtually identical provisions in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. I) 801 *et seq.*). The Fourth Circuit has also considered the issue and held that such mines are covered. *Sink* v. *Kleppe*, 538 F. 2d 325 (1976) (table), cert. denied, 429 U.S. 1093 (1977).

2. Petitioners argue (Pet. 6-8) that the court of appeals erred in concluding that Kraynak Coal's operations affect interstate commerce within the meaning of 30 U.S.C. 803. This fact-bound claim is likewise without merit. As noted above, the record shows that Kraynak Coal annually sold more than 10,000 tons of coal, at a minimum of $25 per ton, to a paper producer. Using the coal for power, the paper company manufactured goods that were sold nationally. On these facts, the district court properly concluded that Kraynak Coal's activities directly affected commerce. See *Costanzo Coal Mining Co.* v. *Weirton Steel Co.*, 150 F. 2d 929 (4th Cir.), cert. denied, 326 U.S. 765 (1945).

Moreover, it is established that where Congress regulates a class of activity, all members of the class are covered, including a particular member whose activities are entirely intrastate. *Perez* v. *United States*, 402 U.S. 146 (1971). In enacting the Coal Act, Congress sought to regulate coal mining as a class. This is reflected in 30 U.S.C. 803, which extends the Act's coverage to "[e]ach coal mine * * * and every miner." Also indicative of congressional intent to cover coal mines as a class is the emphasis throughout the Act's prologue on conditions in "the Nation's coal mines," with no express limitation or exception (30 U.S.C. 801(c), (d), and (g)). In addition, as the court below noted (Pet. App. 14-15), the legislative history reveals that Congress intended to regulate coal mining "to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966).

In any event, even purely intrastate activity may be found to affect interstate commerce when combined with the conduct of others similarly situated. *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The cumulative effect of

small mine operations is far from trivial. In coal mining alone, there are 1,038 operations with four or fewer miners. These operations produce approximately 10.8 million tons of coal yearly. U.S. Mine Safety and Health Administration, *Information Report 1097* at 70-75 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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